88-1422

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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NO.

In The Supreme Court of the United States

October Term 1988

LOUIS E. WOLFSON,
Petitioner.

—v.—

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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1. QUESTIONS FOR REVIEW

ONE: Whether **Bouie's**[1] ban against judicially dispensed ex post facto laws operates, simpliciter, in Wolfson's case, where The Court of Appeals overruled a 1943 decision of its own, i.e. **Schillner**,[2] construing Section 5(a)(1), narrowly, and applied, retroactively, a 1965 District Court decision, i.e. **Kane,**[3] construing The Section, broadly -- the effect of which judicial turnabout was to accommodate Wolfson's conviction for mailings not criminal when made, in 1961-1962?

TWO: Whether **Bouie** forebade sustention of Wolfson's Section 5(a)(1) conviction on analogized mail fraud theory -- taking into account that, as of the dates of the charged mailings, settled decisional law and legislative history informed him that The Section's jurisdictional base, as enacted, was narrower than the

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[1] **Bouie v. City of Columbia**, 378 US 346 (1964)

[2] **Schillner v. H. Vaughn Clarke**, 134 F.2d 875 (2nd Cir, 1943)

[3] **U.S. v. Kane,** 243 F.Supp 746 (S.D.N.Y. 1965)

mail fraud statute's and that, accordingly, such an analogy was impermissible?

THREE: Whether relevant legislative history shows Wolfson was convicted of a judicially created crime under an interpretation of Section 5(a)(1) which enlarged The Section's scope beyond Congress' intendment?

FOUR: Whether The **Wolfson II** Panel's decision,[4] itself, trespassed **Bouie** for ratifying his conviction on the basis of a construction of Section 5(a)(1) imputing to it a sweep, unforeseeably and radically, more expansive than was imputed to it, as construed, at the time of the mailings charged?[5]

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[4] The Court of Appeals decision, affirming Wolfson's conviction, in1968, will be designated **Wolfson I** and the decision, affirming denial of coram nobis, here, will be designated **Wolfson II**

[5] **Marks v. U.S.**, 430 U.S. 188 (1977)

TABLE OF CONTENTS

	PAGE
QUESTIONS FOR REVIEW	i
TABLE OF AUTHORITIES	iii
REFERENCE TO OPINIONS	1
STATEMENT OF JURISDICTIONAL GROUNDS	1
STATUTES INVOLVED	2
JURISDICTION OF THE DISTRICT COURT	2
STATEMENT OF THE CASE	2
ARGUMENT	11
APPENDIX	A-1
PROOF OF SERVICE	A-105

TABLE OF AUTHORITIES

Bouie v. City of Columbia, 378 US 346 (1964) — i,15,16,24,26,27

Byrnes v. Faulkner, Dawkins & Sullivan 413 F.Supp 453 (S.D.N.Y. 1976) aff'd 550 F.2d 1303 (2nd Cir. 1977) — 5,23

Chiarella v. U.S., 445 US 222 (1980) — 30

Cola v. Reardon, 8
787 F.2d 681 (1st Cir. 1986)
cert den____ US____

Cole v. Young, 16,19
817 F.2d 412 (8th Cir. 1987)

Dowling v. U.S., 3,20,24
473 US 207 (1985)

Dunn v. U.S., 10
442 US 100 (1979)

Engle v. Isaac, 11
456 US 107 (1982)

Marks v. U.S., ii,14,19,25,27
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Moore v. Wyrick, 15,16,19,25
766 F.2d 1253 (8th Cir. 1985)
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347 US 1 (1954)

Reed v. Lane, U.S. ex rel, 14,15
759 F.2d 618 (7th Cir. 1985)

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478 US 570 (1986)

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531 F.2d 1084 (1st Cir. 1976)

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134 F.2d 875 (2nd Cir. 1943)

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477 US 527 (1986)

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434 F.2d 415 (D.C. 1970)

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294 F.2d 928 (2nd Cir. 1961)
cert den sub nom Mittleman v. U.S.,
368 US 984

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195 F.Supp 795 (S.D.N.Y. 1961)

U.S. v. Kane, i,15,16
243 F.Supp 746 (S.D.N.Y. 1965)

U.S. v. Kenofskey, 7
243 US 440 (1917)

U.S. v. Loschiavo, 12
531 F.2d 659 (2nd Cir. 1976)

U.S. v. McDaniel, 16
343 F.2d 785 (5th Cir. 1965)

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622 F.Supp 721 (N.D. Ill. 1985)
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800 F.2d 164 (7th Cir. 1986)

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Warren v. U.S. Parole Comm. 9
659 F.2d 183 (D.C. 1981)

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397 US 358 (1970)

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18 USC 371 1,2

Section 5, Securities Act of 1933 1,2,10
15 USC 77e(a)

SEC Rule 15c1-4, 17 CFR 240.15c1-4 1,3,5

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and Article I, Section X, Clause 1

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Byse & Bradley, PROPOSALS TO AMEND THE SECURITIES ACT, 96 U. PA L. Rev 609 (1948) 18

THE FEDERALIST PAPERS 31

Forer, A COMMENT ON AMENDMENTS TO THE SECURITIES ACT, 103 U.PA L. Rev 1020 (1955) 32

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2. REFERENCE TO OPINIONS

The Official Reports of Wolfson's case are:

U.S. v. Wolfson, 269 F.Supp 621 (S.D.N.Y. 1967); **U.S. v. Wolfson**, 297 F.Supp 881 (S.D.N.Y. 1968) aff'd 413 F.2d 804 (2nd Cir. 1968); **U.S. v. Wolfson**, 405 F.2d 779 (2nd Cir. 1968) cert den 394 US 946; **U.S. v. Wolfson**, 558 F.2d 59 (2nd Cir. 1977).

3. STATEMENT OF JURISDICTIONAL GROUNDS

The Judgment, below, was entered November 2, 1988.

A Petition for Rehearing, in banc, was denied December 12, 1988.

28 USC 1254 confers jurisdiction on This Court.

4. STATUTES INVOLVED

The due process clause of The Federal Constitution, as provided for in The Fifth Amendment (A-3), Federal Statutes 18 USC 371 (A-2), 15 USC 77e(a) (A-1), and SEC Rule 15c1-4 (A-4) are involved.

5. JURISDICTION OF THE DISTRICT COURT

Jurisdiction in the Court of first instance was invoked under 28 USC 1651.

STATEMENT OF THE CASE

1967 Conviction

September 29, 1967, Wolfson was convicted on all Counts of a Nineteen Count Indictment (A-36) charging a Section 371 conspiracy to violate, and eighteen substantive violations of, Section 5(a)(1) of The Securities Act of 1933.

The evidence disclosed that the disputed transactions involved sales of unregistered securities to Brokers, acting as Market Makers, upon whom, The Government confessed, no fraud was practiced. (A–49)

No uses of the mails were charged, or proven, except certain mailings by the Brokers, to Wolfson, in

compliance with SEC Rule 15c1-4, confirming the transactions.[6] (A-4)

His conviction was affirmed and certiorari denied.[7]

Suit For Coram Nobis

December 12, 1987, Wolfson sued for a writ of coram nobis asserting (1) that his conviction was enabled by an ex post facto law, judicially imposed, within the meaning of **Bouie** and (2) that his conviction, also, was extra-jurisdictional for judicial encroachment upon Congress' exclusive power to create and punish crimes inasmuch as Section 5(a)(1)'s legislative history is conclusive that Congress did not intend that the mailings, in controversy, be deemed to fall within The Section's condemnation.[8]

The District Court denied relief -- concluding that "the arguments regarding . . . (the) convictions . . . have

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[6] **U.S. v. Wolfson**, 269 F.Supp 621, p. 625 (S.D.N.Y. 1967)

[7] **U.S. v. Wolfson**, 405 F.2d 779 (2nd Cir. 1960) cert den 394 US 946

[8] **Dowling v. U.S.**, 473 US (1985)

been raised and decided adversely . . . (and) cannot be raised again, here." (A-90)

The Court of Appeals affirmed by Summary Order reasoning that Section 5(a)(1)'s language "is not narrow and precise but . . . broad and nonrestrictive" -- that, thus, retrospective judicial enlargement of The Section's scope, however far-reaching, is immune to **Bouie**-analysis. (A-97-102)

Facts

The case against Wolfson, always, was, and is, a case in search of a plausible theory of guilt extrudible from Section 5(a)(1).

The Indictment couched a theory based upon brigaded operation of Section 5(a)(1) and Section 2(10), i.e. that Wolfson mailed confirmations of his sales -- that the confirmations were prospectuses, as defined by Section 2(10) -- that the mailings, ergo, facially, violated Section 5(a)(1) which prohibits use of the mails to sell unregistered securities "through the . . . medium of a prospectus. . . ." (A-37, 40)

Wolfson moved to dismiss objecting that the allegations created a mirage -- that the confirmations were not addressed to buyers and, hence, were not Section 2(10) prospectuses (A-63-69) that, rather, they were slips from Wolfson's Brokers to him, as seller, mandated by Rule 15c1-4[9] and accordingly, **Schillner**, precluded application of Section 5(a)(1) to such post-sale, mandated mailings. (A-69)

Abandonment of Indictment

The Government, in response, mutely, abandoned the Indictment -- retreated behind a plea that "final decision," on Wolfson's Motion, "should await trial" (A-73) -- and called **Schillner** irrevelant. (A-73)

District Court's Theory

The District Court, however, without delay, sustained the Indictment on an interpretation of **Schillner** polar to The Government's, namely; that Judge Woodbury's Opinion, there, was "guidance" for

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[9] **Byrnes v. Faulker, Dawkins & Sullivan**, 413 F.Supp 453, p. 462 (S.D.N.Y. 1976) aff'd 550 F.2d 1303 (2nd Cir. 1977)

a conclusion that Congress' postal power was exhausted in Section 5 which "proscribes any mailing . . . made for the purpose of effecting the sale, transfer or delivery of unregistered stock."[10]

Government's Theory at Trial

At trial, the U.S. Attorney urged that the theory of guilt presented to the Grand Jurors to induce them to indict Wolfson should not be presented to the Jurors selected to try him under the Indictment because "although the indictment says the sales were accomplished by means of a prospectus . . . the government does not contend and has no proof that a prospectus was used." (A-60-61)

Theory On Which Jury Instructed

Applying **Schillner**, The District Court instructed that any use of the mails, resulting from Wolfson's "dealings," (A-57-59) sufficed.

The Court, like The U.S. Attorney, "was disturbed" about the prospect of acquittal if the Jury, mistakenly,

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[10] 269 F.Supp p. 625.

tried Wolfson for the specific crime, framed in the Indictment, for which there was no proof instead of the enlarged crime, framed in the Instructions -- a potential for confusion due to The Government's "distinguished pleaders in this case . . . (who chose, unwisely) to adhere to the statutory language when the indictment . . . (was) prepared." (A-61-62)

Court of Appeals' Mail Fraud Theory

The Court of Appeals affirmed, saying, in words or effect;

That The District Court was misguided to the extent **Schillner's** "guidance" was relied upon to uphold Wolfson's prosecution since, **Schillner**, decided in 1943, construed Section 5(a)(1) to be too narrow to contemplate post-sale mailings. 405 F.2d 783

That, however, Wolfson's Brokers' mailings were foreseeable and, therefore, forbidden by analogy to mail fraud theory, as exposited in **Pereira**[11] and

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[11] **Pereira v. U.S.**, 347 US 1 (1954)

Kenofskey[12] - and carried over into Section 5(a)(1), by **Kane**, decided in 1965, which, in part, declared The Section capable of snaring "tangential" mail uses.

That "We consider this a correct statement of the law."

That "If anything said in **Schillner** . . . can be read to the contrary it is to be disregarded." 405 F.2d p. 784

Theory Adopted In Wolfson II

In **Wolfson I**, The Government, at no stage, argued that mail fraud theory was importable into Section 5(a)(1) to proscribe all foreseeable mailings -- and The Court's pronouncement, to such effect, could not have been divined by Wolfson beforehand.[13]

In **Wolfson II**, however, his Briefs excavated legislative history which demonstrated, beyond good faith contradiction, that, as enacted, Section 5(a)(1)'s jurisdictional base was not intended to be equated with the mail fraud statute's (A-27-28) and that

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[12] **U.S. v. Kenofskey**, 243 US 440 (1917)

[13] **Cola v. Reardon**, 787 F.2d 681, 691 (1st Cir. 1986)

Congress, twice, declined to amend The Section, at The SEC's behest, to work equation.[14]

The Government, thus, sought to revive the theory of guilt alleged in the Indictment (A-77-78) -- a strategy, apparently, undertaken without consulting the **Wolfson I** trial record showing a renunciation of the allegations as unfounded and unprovable.

Recapitulation

A chaos of theories of guilt was asserted, in **Wolfson I** and **Wolfson II**, to give color of authority to his conviction and its perpetuation.

Restated, some of them were:

His Indictment was procured on a theory based on false allegations, expressly, recanted by The Government.

The Indictment was saved from dismissal, before trial, and the case against him, at trial, submitted to the

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[14] Wolfson was charged with knowledge of Section 5(a)(1)'s legislative history. **U.S. v. Casson**, 434 F.2d 415, 422 (D.C. 1970); **Warren v. U.S. Parole Comm.** 659 F.2d 183, 194 (D.C. 1981)

Jury on the theory that **Schillner** bespoke Section 5(a)(1)'s competence to reach all resulting mailings, of any kind, at any time. (A-56-59)

On Appeal, **Schillner** was overruled, as inhibiting The Section's application to Wolfson's post-sale mail uses, but his conviction was affirmed on a revised theory not submitted to the Jury i.e. that The Section was co-extensive with the mail fraud statute, jurisdictionally.[15]

On coram nobis, The Government returned to the theory alleged in the Indictment but disavowed, at trial. (A-93-94)

Lastly, the **Wolfson II** Panel announced a theory which, sub silentio, overruled **Wolfson I**'s foreseeability standard and construed Section 5(a,(1)'s sweep to be omnicompetent -- a construction applied, retroactively, to justify Wolfson's conviction and denial of The Writ.

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[15] **Dunn v. U.S.**, 442 US 100 (1979); **Cola v. Reardon**, supra, fn 13

ARGUMENT

Reasons For Granting Certiorari

This Court, in a succession of cases, during the past decade, has remade the landscape upon which collateral attacks, directed to criminal convictions, may be staged.[16]

A Constitutional claim is not triable, or retriable, collaterally, except upon a showing that a Writ, if granted, will establish a claimant's innocence.[17]

The decisions, however, resonate a unifying subtext stressing that no Federal Court business is more compelling than ensuring "that only the guilty are criminally punished"[18] -- for "it is far worse to convict an innocent man than to let a guilty man go free."[19]

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[16] **Wainwright v. Sykes**, 433 US 72 (1976); **Engle v. Isaac**, 456 US 107 (1982); **U.S. v. Frady**, 456 US 152 (1982); **Murray v. Carrier**, 477 US 478 (1986); **Smith v. Murray**, 477 US 527 (1986)

[17] **Rose v. Clark**, 478 US 570 (1986)

[18] ibid

[19] ibid, quoting from Mr. Justice Harlan's concurrence in **In re Winship**, 397 US 358, 372 (1970)

The Second Circuit, in **Loschiavo**,[20] made the point, resoundingly, saying:

That "Loschiavo was convicted for a federal crime that did not exist;" 531 F.2d 666

That "The government is insisting on keeping . . . (him) branded with the conviction and prison sentence . . . in spite of (. . . proof) that he was convicted for a non-existent federal offense;" 531 F.2d 666

That "To say in such circumstances the system of justice can provide no remedy . . . (would indicate) lack of due process in the judicial system"[21] 531 F.2d 666

Wolfson's Petition is an invitation for This Court to transact such high-preferred business.

He was convicted of non-criminal acts by means of an ex post facto law, judicially decreed.

The prohibition against ex post facto laws is a constitutional absolute!

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[20] **U.S. v. Loschiavo**, 531 F.2d 659 (2nd Cir. 1976)

[21] **Murray v. Carrier**, supra, fn 16; **Smith v. Murray**, supra, fn 16

Whether a Bill of Rights was necessary and proper -- guaranteeing free speech, press, religion, assembly, etc. --- divided The Conventioneers, in 1787,[22] and was not appended to The Constitution until 1789, but there was unanimity, at The Convention, that ex post facto laws, as proven engines of official terror, should be put off-limits to Federal and State Governments, alike[23] -- a unanimity which yielded incorporation of Article I, Section IX, Clause 3 and Section X, Clause 1 of the same Article, in the body of The Constitution, itself, "without a word of debate or single adverse vote."[24]

The Clause was intended to shackle legislative power but the due process guarantee against a **Bouie**-type ex post facto law is of no lesser constitutional magnitude. 378 US 362

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[22] Brant, The Bill of Rights, Its Origin and Meanings (1965) p. 36-52, 68-69

[23] ibid

[24] Brant, op cit, p. 35

This Court, then, in Wolfson's case, is called upon, at once, to undo his conviction for a crime unknown to the law and vindicate the pre-eminent Constitutional value enshrined in The Clause, as extended in **Bouie**.

There can be no better reasons for grant of Certiorari.

Question One:

In **Schillner**, in 1943, The Second Circuit construed Section 5(a)(1) to be too narrow to interdict after-sale uses of the mails -- a construction repropagated, explicitly, in **Robertson**, in 1959, and, implicitly, in **Crosby**,[25] in August 1961.

Wolfson was entitled to rely upon **Schillner** in steering his conduct[26] and, accordingly, was informed

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[25] **U.S. v. Crosby**, 294 F.2d 928 cert den sub nom **Mittleman v. U.S.**, 368 US 984

[26] **Marks v. U.S.**, supra, fn 5; **Moore v. Wyrick**, 766 F.2d 1253, 1257-58 (8th Cir. 1985); **U.S. ex rel Reed v. Lane**, 759 F.2d 618 (7th Cir. 1985); **U.S. v. Goodheim**, 664 F.2d 754 (9th Cir. 1981)

that the mail uses, charged to him, were noncriminal[27] when made, i.e. October 5, 1961 to January 9, 1962.

The **Wolfson I** Panel, plainly, was aware that **Schillner** encumbered Wolfson's successful prosecution but, seemingly, was unaware that retrospective disencumbrance would generate a **Bouie** problem.

Certainly, the action taken broadsided **Bouie** which is to say; The Panel declared that **Schillner** should be "disregarded,"[28] as defunct, to the extent its narrow construction of Section 5(a)(1) was "contrary" to a District Court's "correct statement of the law," in 1965, in **Kane** -- a statement which, on borrowed mail

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[27] It, of course, is a fiction that lay-persons are aware of the quiddities of decisional law, construing criminal statutes, but the fiction is vital to enforcement of the prohibition against ex post facto laws. **U.S. ex rel Reed v. Lane**, supra, fn 26, p. 621; See, too, **U.S. v. Goodheim**, supra, fn 26, p. 756

[28] The Panel's words were "If anything said in **Schillner** . . . can be read to the contrary it is to be disregarded" 405 F.2d p. 784. In **Moore** near identical words were used to dispel an unwelcome precedent, i.e. "insofar as **Majors** . . . (is) inconsistent with this opinion . . . (it) must no longer be followed." 766 F.2d p. 1260. The Eighth Circuit concluded the result was that "the Missouri Supreme Court explicitly overruled its prior opinion in **Majors**." 766 F.2d 1257

fraud rationale, construed The Section, broadly, to extend to "tangential" mailings.[29]

But for the overruling of **Schillner** -- coupled with retroactive application of **Kane** -- Wolfson's conviction would not have been sustainable. Unarguably, therefore, he was convicted and punished, per se under a **Bouie**-type ex post facto law[30] -- and his conviction should be set aside as an affront to "first principles" of Constitutionalism.[31]

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[29] **Kane** cited **McDaniel**, from The Fifth Circuit, on Section 5(a)(1) vis a vis tangential uses and **McDaniel**, in turn, cited **Pereira** and other mail fraud cases as persuasive authorities. **McDaniel v. U.S.**, 343 F.2d 785, 787-788 (1965). **McDaniel**, like **Kane**, was decided in 1965 and is inapplicable, retroactively, to Wolfson.

[30] In **Bouie**, a criminal trespass statute was construed and enlarged, unpredictably, by aid of "cases . . . completely unrelated to . . . (the) statute " 378 US 379. **Bouie**, therefore, put in place a considerable analytical framework to verify that the disputed construction, actually, worked an ex post facto law. But in a brightlined case, like Wolfson's, where a decision overrules a prior interpretation, an ex post facto law, per se, results. **Cole v. Young**, 817 F.2d 412, p. 421. **Marks v. U.S.**, supra, fn 5 p.195; **Moore v. Wyrick**, supra, fn 28 p. 257

[31] Madison, in The Federalist Paper, NO. 44, denounced "ex post facto laws (. . . as) contrary to first principles of the social compact . . . "

Question Two:

The disputed mailings, here, were made between October 5, 1961 and January 9, 1962.

As of those dates, the SEC acknowledged, Legislative History documented and The Courts declared that Section 5(a)(1)'s narrowness foreclosed interchange of case law with broad-gauged antifraud statutes, like Section 12(2), Section 17(a) and Section 1341.

As for The SEC's acknowledgment, August 7, 1941, The Agency reported to The House Committee on Interstate Commerce that Section 5's jurisdictional base was "much narrower" than the mail fraud statute's and proposed The Section be amended and enlarged to apply, like the mail fraud statute, "if the mails are used in any step of the transaction."[32]

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[32] Report of . . . (The SEC) on Proposals For Amendments To The Securities Act of 1933 . . ., August 7, 1941, p. 7, hereafter called the SEC Report

As for Legislative History, The House Committee twice considered the SEC's proposal, in 1941, and, again, in 1947, without taking action.[33]

As for The Courts, in **Schillner** in 1943, The Second Circuit construed Section 5(a)(1) to be incapable of reaching after-sale uses of the mails such as fell within the reach of Section 12(2)'s civil fraud remedy.

In **Robertson**, 1959, Judge Herlands, a Securities Law expert,[34] sitting in The Southern District of New York, concluded that legislative history and **Schillner** required a narrow construction of Section 5(a)(1) -- a construction which, more specifically, meant that The Section could not be invoked to support an Indictment charging post-sale uses of the mails to remit payments for unregistered securities -- although the same uses

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33 Byse & Bradley, Proposals To Amend The Securities Act, 96 U. of Pa. L. Rev 609 (1948)

34 Immediately after The 1933 Act's passage, he wrote a two part Law Review Article on its "Criminal Law Aspects," 67 US Law Rev p. 562-575, 615-627, and in 1934, wrote another on The Exchange Act, 21 Va. L. Rev 139

authorized a Section 17(a) Indictment charging fraud in making the sales.

In **Crosby**, decided August 22, 1961, six weeks before the alleged Wolfson mailings, The Second Circuit held that post-sale mailings of prospectuses, or brochures, were inoffensive to Section 5(a)(1) yet prosecutable crimes under Section 1341, i.e. the mail fraud statute.

All things considered, then, Wolfson could not have foreseen that The Court of Appeals, in his case, would conscript mail fraud cases, as persuasive authorities, for a construction of Section 5(a)(1) which Draconianized its scope -- and applied, retroactively, exposed him to criminal liability for mailings blameless when made.[35]

He stands convicted under an ex post facto law obnoxious to **Bouie**.

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[35] **Marks v. U.S.**, supra fn 5; **Moore v. Wyrick,** supra, fn 26; **Cole v. Young**, supra, fn 30; **U.S. v. Yonan**, 622 F.Supp 721, 726 (N.D. Ill 1985) aff'd in part, rev'd in part 800 F.2d 164 (7th Cir. 1986)

Question Three

Relevant legislative history is conclusive that The **Wolfson I** Panel's construction of Section 5(a)(1) was extra-jurisdictional[36] as well as invasive of **Bouie** -- that, by judicial largess, The Panel dispensed an enlargement of The Section which Congress had refused to dispense.

The history shows that in 1940-41, at the suggestion of The House Committee on Interstate Commerce, the SEC and The Investment Bankers Association, hereafter called The Industry, conferred about curative amendments to The 1933 and 1934 Acts. (A-11)

Section 5(a)(1)'s foreshortened reach, hindering enforcement, was prominent among the problems which impelled the Conferences and, July 30, 1941, the Industry reported to The House Securities and Exchange Committee saying; inter alia, that the conferees proposed Section 5(a)(1) be amended to

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[36] **Dowling v. U.S.**, supra, fn 8; **Williams v. U.S.**, 458 US 279 (1982)

make it "unlawful to sell a security . . . or collect or receive payment of any part of the purchase price" -- an amendment that "goes beyond the present statute which contains no prohibition as to the collection or receipt of the purchase price." (A-20)

The Industry, further, reported agreement on the desirability of superadding a "new Section 5(c) to broaden the jurisdictional base on which . . . (The SEC) may enforce the requirements of the proposed Section 5" -- a broadening which "Specifically . . . would make the prohibitions of the Section apply if the mails . . . are used at any time, or in any way . . . in connection with the offer to sell, or sale of, a security." (A-24-25)

August 7, 1941, the SEC, also, reported to The Committee pointing out that Section 5's "jurisdictional base is . . . much narrower than . . . in the mail fraud statute which applies if the mails are used in any step in the transaction" -- that "the proposed amendment of Section 5 . . ." would close "this loophole . . . by bringing within (the ambit of the) section all parts of the

transaction if any part is affected through the mails . . .", including collection or receipt of the purchase price. (A-27)

December 7, 1941, Pearl Harbor supervened and the amendments languished.[37]

In 1947, the SEC proposed them, again, but Congress declined enactment.[38]

In 1954, the SEC mulled submission, a third time, but ". . . refrained . . . because it would have called for a somewhat more radical redrafting of Section 5 and it was the administrative policy to 'rock the boat' as little as possible in the hope of maximizing the chance of achieving a long lost legislative reform which was much desired."[39]

Congress, in 1954, nonetheless, did consent to a lesser enlargement of Section 5(a)(1)'s jurisdictional base.

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[37] SEC Release No. 3224, June 6, 1943

[38] Forer, A Comment on The Amendments to The Federal Securities Act, 103 U. of PA L. Rev 1020, (1955).

[39] Loss, Securities Regulation, Stu Ed p. 208-209 (1961)

It was done, obliquely, by reworking the term prospectus in Section 2(10), to include "any communication . . . which . . . confirms the sale of any security"[40] -- but, of course, Section 2(10), as amended, has no relevance to Wolfson's case since no communication of any kind, sort, variety, or description, addressed to a Seller, may be considered a prospectus. (A-81)

Obvious conclusions drawable from the history are:

That Section 5(a)(1)'s jurisdictional base, as enacted, was not co-terminous with the mail fraud statute's;

That The SEC proposed, but failed to, induce Congress to amend The Section to such effect -- and The Agency, discreetly, elected to abandon the proposal;

That The Court, thus, effectively, rewrote and expanded Section 5(a)(1) to comprehend a scope

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[40] **Byrnes v. Faulkner**, et al, supra, fn 13

duplicative of the mail fraud statute's -- a duplication Congress declined to enact;

Clearly, **Wolfson I**, encroached upon Congress' exclusive power to define and punish crimes.[41]

Judicial power worked a legislative end denied in the legislative process itself.[42]

Question Four

The **Wolfson II** Court expounded that he is not positioned to assert a **Bouie** claim against The **Wolfson I** Court's construction of Section 5(a)(1) for two reasons, vis (1) **Bouie** functions, only, when a "narrow and precise" statute is construed, unexpectedly and indefensibly and (2) Section 5(a)(1) is not "narrow and precise" but "broad and nonrestrictive" hence The Section's language, without more, was warning enough as to its scope. (A-100-102)

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[41] **Dowling v. U.S.**, supra, fn 18; **Williams v. U.S.**, supra, fn 36

[42] ibid

In actuality, The Section was "narrow and precise,"[43] as construed in **Schillner, Robertson** and **Crosby**, when the Wolfson mailings were made -- and **Marks** extrapolated and applied **Bouie** where a wide-sweeping statute, on its face, was narrowed, by gloss, then, reinterpreted and enlarged, unpredictably.[44]

In such a situation "whether or not the plain language would, absent prior judicial construction, give . . . fair warning . . . is irrelevant."[45]

Such is Wolfson's situation, exactly, from which it follows that The **Wolfson I** Court's decision invaded **Bouie** even assuming, arguendo, that The **Schillner, Robertson** and **Crosby** Courts misread

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[43] Judge Herlands exhumed legislative history to show that Congress crafted The Section "with careful precision . . . and its words mark the exact spot at which it stops" -- a "detailed particularity . . . which . . . (limits) needful judicial interpretation to an unusual degree" -- and enjoins Federal Courts not to "extend (The Section) beyond the special limitations Congress . . . imposed." **U.S. v. Robertson**, 181 F.Supp 158 (S.D.N.Y. 1959) p. 165

[44] **U.S. v. Marks**, supra, fn 5, p. 195

[45] **Moore v. Wyrick**, supra, fn 26, p. 1257-1258

and misconstrued Section 5(a)(1), narrowly, whereas The Section's language signals a "broad and nonrestrictive" ambit.

Wolfson's duty was to obey The Section, as construed, in 1961-1962, not as written.[46]

The **Wolfson II** Court's defense of The **Wolfson I** Court's decision, against **Bouie** assault, then, was grounded upon assumptions, which, plainly, were false -- for failure to reckon with **Marks**.[47]

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[46] **U.S. v. Marks**, supra, fn 5; **Moore v. Wyrick**, supra, fn 26

[47] **Wolfson II's** pivot was that Section 5(a)(1), facially, noted its amplitude but The Court postscripted that Wolfson, also, was warned by **U.S. v. Hughes**, 194 F.Supp 795 (S.D.N.Y. 1959) and Loss' Securities Regulation Text, p. 209, published in July 1961. Neither source said anything to Wolfson he could rely on. **Hughes** posited the wrong legal reason but reached the right result since, on the facts, the mailings alleged consisted of confirmations to Buyers which, of course, were Section 2(10) prospectuses that, automatically, switched on Section 5(a)(1) jurisdiction. As for The Professor, it is apparent that, in context, he bemoaned Congress' refusal to enact enlargement of Section 5(a)(1), as proposed by The SEC, but speculated The Courts, might intervene to do the enlarging, by smuggling in mail fraud rationale, to construe The Section to extend to remittance of payment. When he wrote, legislative history and the law, as seen in **Robertson**, disfavored his wishful thinking. Further, he did not anticipate **Bouie** nor take into account that Federal Courts may not amend and expand the scope of statutes to create crimes Congress did not intend. **U.S. v. Dowling**, supra, fn 8. Then, too, in August 1961, **Crosby** came down holding that post-sale mail uses not reachable by

What is more, there is a feature of **Wolfson II** that, fairly, may be said to dumbfound an informed reader -- which is to say; Wolfson's conviction was reaffirmed on a construction of Section 5(a)(1) that, itself, amounted to a judicially authored ex post facto law intolerable to **Bouie** -- as is apparent when viewed in perspective, as follows, viz:

At trial, The Jury was instructed that Wolfson could be found guilty upon proof that his sales resulted in mailings, of any sort, at any time, by anybody -- an instruction derived from The District Court's view that The Section should be deemed as far-reaching as Congress' postal clause power.

The **Wolfson I** Court disclaimed such an omnium gatherum interpretation but affirmed on a revised theory which restricted The Section's coverage to

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Section 5(a)(1) were reached by the mail fraud statute. **Crosby**, effectively, eclipsed the Professor's musings about the coming advent of an hermaphroditic version of The Section. Wolfson was bound to act on the belief that conduct conformable to **Crosby** was lawful. **U.S. v. Marks**, supra, fn 5. His mailings conformed.

"foreseeable" mail uses, like those articulated in mail fraud cases.

The **Wolfson II** Court, however, construed The Section ipse dixit to have a "nonrestrictive" competence -- a construction that collided with the decisional law construing The Section, narrowly, at the time of the Wolfson mailings -- a construction, that, gratuitously, disowned, without saying so, **Wolfson I's** foreseeability limitation, as well.

In fine, The **Wolfson II** Court's construction of Section 5(a)(1), itself, purveyed a **Bouie** forbidden ex post facto law, inasmuch as a freakish change in the law was wrought which, greatly, expanded The Section's scope and applied, retroactively, legitimized Wolfson's conviction for non-criminal acts.

CONCLUSION

Wolfson was charged with Section 5(a)(1) violations under an Indictment which manufactured a theory of guilt.

His prosecution was kept alive and his conviction enabled by means of a District Court substitute theory unmentioned in the Indictment and unargued by The Government.

The Court of Appeals affirmed on a revised theory -- not sent to the Jury -- not contended for by The Government -- not noticed to Wolfson, beforehand -- and announced in an opinion which overruled a longstanding decision of The Court's own and applied, retroactively, a District Court decision.

Wolfson sued for coram nobis, in 1987, asserting that the construction given Section 5(a)(1), in **Wolfson I**, transgressed **Bouie**.

The **Wolfson II** Court denied relief under a construction of The Section even more notoriously transgressive.[48]

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[48] The surpassing vice, where shifting theories of guilt are used to keep a prosecution afloat, as in Wolfson's case, is that the accused is disabled to fathom how to go about making his defense. In The First Circuit's words, ". . . the shifting theories underlying the charge, the conviction and the decision on appeal leave considerable doubt as to the precise nature of . . . (the accused's) offense and . . . the proof and legal arguments that might have been able to establish innocence." **Royal v.**

Wolfson prays for grant of Certiorari.

Respectfully submitted,

ORIGINAL SIGNED BY;
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Superior Ct, 531 F.2d 1084, 1087 (1976); See, also, **Chiarella v. U.S.**, 445 US 222, 235-237

APPENDIX

TABLE OF CONTENTS

EXHIBIT		PAGE
I	- 15 USC 77e(a)	A-1
II	- 18 USC 371	A-2
III	- United States Constitution, Amendment V	A-3
IV	- Rule 15c1-4, 17 CFR 240.15c1-4	A-4
V	- IBA Report of Proposals for Amending The Securities Act of 1933 . . . July 30, 1941	A-11
VI	- Report of The Securities and Exchange Commission on Proposals for Amendments to the Securities Act of 1933 . . . August 7, 1941	A-26
VII	- Committee Print of Comparative Print Showing Proposed Changes in the Securities Act of 1933 . . . October 18, 1941	A-31
VIII	- Indictment - 66 Cr 120	A-36
IX	- Stenographer's Minutes of Wolfson Trial	A-42
X	- Defendant's Memorandum in Support of Motion To Dismiss Counts Two through Nineteen	A-63

EXHIBIT PAGE

XI - Government's Memorandum of Law in Opposition To Defendants's Motions for Dismissal of the Indictment..... A-71

XII - Government's Memorandum of Law in Opposition To Petition for Writ of Coram Nobis..... A-76

XIII - Transcript of Hearing, February 23, 1988..... A-80

XIV - Memorandum and Order of United States District Court, Southern District of New York, May 17, 1988..... A-82

XV - Government's Brief before The Second Circuit Court of Appeals..... A-92

XVI - November 2, 1988 Decision of the Second Circuit Court of Appeals..... A-97

XVII - December 12, 1988 Order Denying Rehearing En Banc..... A-103

EXHIBIT I

15 USC 77e (a)

(a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly --

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

EXHIBIT II

18 USC 371

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons to any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

EXHIBIT III

United States Constitution

Amendment V

No person shall be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

EXHIBIT IV

§240.15c1-4 Confirmation of transactions.

(a) The term "manipulative, deceptive, or other fraudulent device or contrivance," as used in section 15(c)(1) of the act, is hereby defined to include any act of any broker or dealer designed to effect with or for the account of a customer any transaction in, or to induce the purchase or sale by such customer of, any security (other than U.S. Tax Savings Notes, U.S. Defense Savings Stamps, or U.S. Defense Savings Bonds, Series E, F and G) unless such broker or dealer, at or before the completion of each such transaction, gives or sends to such customer written notification disclosing (1) whether he is acting as a broker for such customer, as a dealer for his own account, as a broker for some other person, or as a broker for both such customer and come other person; and (2) in any case in which he is acting as a broker for such customer or for such customer and some other person, either the name of the person from whom the security was purchased or to whom it was

sold for such customer and the date and time when such transaction took place or the fact that such information will be furnished upon the request of such customer, and the source and amount of any commission or other remuneration received or to be received by him in connection with the transaction.

(b) Notwithstanding paragraph (a) of this section, any broker or dealer may effect with or for the account of any customer the purchase of securities issued by any open-end investment company or unit investment trust registered under the Investment Company Act of 1940 without giving or sending to such customer at or before the completion of each such transaction for the purchase of such securities a written notification as required by paragraph (a) of this section, provided that:

(1) Such securities are purchased by the customer pursuant to an individual retirement of pension plan qualified under the Internal Revenue Code, and the broker or dealer, or an agent of the broker or dealer, gives or sends to the customer within five business

days after the end of each quarterly period in which such customer has purchased securities issued by such registered investment company, a written statement setting forth the following information relating to such customer's transactions in securities of the registered investment company: all purchases, redemptions, sales, dividends and distributions effected during such quarterly period; the dates of each such transaction; the number of shares issued to, redeemed or sold by such customer in each such transaction; the amount of sales load or commission, if any, paid for each such transaction; and the total number of shares owned by such customer, and the total net asset value of such shares, at the end of such quarterly period; or

(2) Such securities are purchased by the customer pursuant to a group plan for the purchase of securities of such registered investment company, and

(i) The terms of the plan provide for remittance of the amounts paid by the customer pursuant to such group plan so that they are received by the registered

investment company or its agent as soon as practicable but in no event more than 35 days after the receipt of such amounts by a person designated by the group to collect and remit such amounts to the registered investment company or an agent of the registered investment company;

(ii) The broker or dealer, or an agent of the broker or dealer, gives or sends to the person designated by the group a written notification of the receipt of payment at or before the completion of each transaction for the purchase of securities of the registered investment company; and

(iii) The broker or dealer, or an agent of the broker or dealer, gives or sends to such customer a written statement as required by subparagraph (1) hereinabove within five business days after the end of each quarterly period in which such customer was a member of the group plan, except that the broker or dealer shall not be required to give or send such written statement to the customer if (A) the customer has not purchased securities of the registered

investment company pursuant to the group plan for two consecutive quarterly periods, other than through the automatic reinvestment of dividends or capital gains distributions, and (B) the broker or dealer, or an agent of the broker or dealer, gives or sends a written notification to the customer that the customer will not receive such written statements after the expiration of such two consecutive quarterly periods; and

(3) Payment by a customer who does not participate in any group plan, or by the person designated by the group of which a customer is a member ("designated person"), for the purchase of securities of the registered investment company is made directly to, or is made payable to, the registered investment company or the principal underwriter, custodian, trustee or other designated agent of the registered investment company ("designated agent"); *Provided, however,* That in any group plan in which payment is collected by a designated person from the customer other than by means of a payroll deduction arrangement under which such designated person is

either an employer of the customer or a labor union in which such customer is a member, such customer shall make payment payable to the registered investment company or its designated agent;

(4) If such securities are purchased pursuant to a group plan, the written statement referred to in subparagraphs (1) and (2) hereinabove shall be deemed to have been given or sent to the customer if such statement is given or sent to a person designated by the group for distribution to the customer;

(5) The intention to give or send to the customer the written statement referred to in subparagraphs (1) or (2) of this paragraph in lieu of the written notification required by paragraph (a) of this section, is disclosed in the prospectus given to such customer pursuant to section 5 of the Securities Act of 1933;

(6) At or before the completion of the transaction for the purchase of shares issued by the registered investment company, the broker or dealer, or an agent of the broker or dealer, delivers a prospectus which complies with section 10 of the Securities Act of 1933

to such customer or, with respect to group plans, delivers prospectuses so complying to a person designated by the group of which such customer is a member for distribution to the members of the group; and

(7) For purposes of this paragraph (b), the term "group plan" shall mean any plan for the purchase of securities issued by a registered open-end investment company or unit investment trust involving two or more purchasers and contemplating periodic purchases of such securities by each member of the group through a person designated by the group for the collection and remittance of amounts for such purpose.

A-11

EXHIBIT V

REPORT

on the Conferences with the

SECURITIES AND EXCHANGE COMMISSION AND ITS

STAFF

on Proposals for Amending the

SECURITIES ACT OF 1933

and the

SECURITIES EXCHANGE ACT OF 1934

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BY THE REPRESENTATIVES OF

Investment Bankers Association of America,

National Association of Securities Dealers, Inc.,

New York Curb Exchange,

and

New York Stock Exchange.

July 30, 1941

Proposal for a revision of Section 5.

That Section 5 of the Securities Act of 1933, as amended, be amended to read as follows:

"(a) It shall be unlawful for any person, by use of the mails or in interstate commerce or otherwise, to sell any security, to deliver any security for the purpose of sale or after sale, or to collect or to receive payment of any part of the purchase price of any security—

"(1) unless a registration statement is in effect as to such security;

"(2) unless the purchaser is sent or given a general prospectus, current at the time of such collection or receipt, so that it would normally be received by him or at the address specified by him not more than thirty days before such sale and not later than the business day before such collection or receipt; and

"(3) unless, if such sale was made within seven days of the first date on which such security was bona fide offered to the public after the effectiveness of the registration statement, (A) a general prospectus current at the time of the sale has been sent or given to the purchaser so that it would normally be received by him or at the address specified by him not more than thirty days and not later than the business day before the sale, or, in the case of a sale made by acceptance by the seller of an order or offer to buy, not more than thirty days and not later than the business day before the making of such order or offer, or (B) a general prospectus current at the time of the sale is sent or given to the purchaser, accompanied or followed by a written confirmation of the sale which is sent or given not later than the first business day after the day of the sale and which states, in such form as the Commission may prescribe, that it is a term and condition of the sale that it shall not become effective if the purchaser, not later than noon (legal time at the address of the purchaser) on the first business day after the day on

which such written confirmation was received by him or at the address specified by him, advises the seller that he has examined the general prospectus and that he elects not to proceed with the purchase. It shall be unlawful to deliver a security sold, or to collect or receive payment of any part of the purchase price therefor, prior to the expiration of the period during which a purchaser may, pursuant to clause (B), elect not to proceed with the purchase. For the purpose of clause (B), proof of the mailing of a general prospectus or of such a confirmation shall constitute prima facie proof of the receipt thereof by the purchaser in the normal course.

"(b) It shall be unlawful for any person, by use of the mails or in interstate commerce or otherwise, to offer to sell any security to any person—

"(1) prior to, and in contemplation of, the filing of a registration statement as to such security, or while the registration statement as to such security is the subject of a refusal order or a stop order under Section 8;

"(2) if a registration statement has been filed but has not become effective as to such security, by any means other than an identifying statement meeting the requirements of Section 2(10)(d), unless the offer is incorporated in, is accompanied by, or has been preceded within thirty days by, a limited or general prospectus current at the time of the offer; or

"(3) if a registration statement is in effect as to such security, by any written means other than an identifying statement meeting the requirements of Section 2(10)(d), unless the offer is incorporated in, is accompanied by, or has been preceeded within thirty days by, a limited or general prospectus current at the time of the offer.

"(c) The provisions of this Section shall apply only if the mails or any means or instrumentality of interstate commerce is used in offering a security for sale, selling it, delivering it for the purpose of sale or after sale, or collecting or receiving payment of any part of its purchase price."

Explanatory Statement.

Section 5 establishes the basic procedures of the Act with respect to the registration of issues of securities and the use of prospectuses. It governs the making of offerings, sales and deliveries of securities. The present text of the Section is shown on page 84.

The representatives of the industry have accepted and give their full support to several proposals for changes which have been made by the Commission extending the application of the Section and adding to the protection which it affords to investors. But it has not been possible to reach an agreement as to desirable changes in Section 5 procedure as a whole. The principal difficulty arises from the fact that the Commission has taken the position . . .

* * *

. . .attempt to obtain an order to buy unless made by means of an identifying statement except where the written offer is incorporated in, or accompanied by a limited or general prospectus. It would also be permissible to send supplementary written information to any person who had within thirty days been sent or given a limited or general prospectus current at the time of the offer.

The use of the proposed limited prospectus would, of course, be subject to the power proposed to be granted to the Commission by Section 10(b)(7) (see page 121) to authorize and classify such prospectuses and to prescribe their form and contents. It is nevertheless contemplated that the limited prospectus will be a simple document of one or two pages presenting the salient facts about an issue in summarized form. If such a document is not developed, the whole theory of the offering procedure surrounding its use would be destroyed.

And the proposed Section 10(b)(6) discussed at page 123 would require that the final general prospectus given to a purchaser show, in a manner to be prescribed by the Commission, the respects in which the information contained therein differs materially from that contained in any earlier general prospectus or limited prospectus given to the purchaser. The proposed Section 5(a)(2) discussed below would require that such a complete prospectus be sent to every purchaser so as to arrive in the normal course not later than the business day before the day when the security is presented for payment.

The procedure governing offerings, contemplated by the proposed Section 5(b)(2) and (3), as above outlined and by Section 5(b)(1) operating in conjunction with the procedure governing sales which would be established by the proposed Section 5(a)(1), (2) and (3), would provide effectively for the protection of investors and the public.

In view of this and provided that "offers to sell" are not subjected to the civil liabilities of Section 12(a) and that Section 5 as a whole is otherwise amended in accordance with the proposals made by the industry, the proposed Section 5(b) is recommended by the representatives of the industry as a desirable change in the statute. In considering the reservation which is made as to Section 12(a) it should be noted that no suggestion is being made by the industry that the full civil liabilities of Section 12(a) should not apply to every sale of a security. The industry supports the view that these liabilities should apply to sales. The point is that unintentional failure to observe a procedural requirement in making an "offer" should not create grounds for a rescission suit where the sale itself is made in conformity with the requirements of the statute.

Procedure governing sales.

The proposed new Section 5(a) would continue and extend the prohibitions contained in the present statute with respect to the making of sales.

As to Section 5(a)(1)

It is provided in the proposed Section 5(a)(1) that, unless a registration statement is in effect as to a security, it shall be unlawful to sell a security, deliver a security, or collect or receive payment of any part of the purchase price. This goes beyond the present statute which contains no prohibition as to the collection or receipt of the purchase price of a security. The proposed revision has been developed in the conferences with the Commission and is acceptable to the representatives of the industry.

As to Section 5(a)(2)

Paragraph 2 of Section 5(a) as proposed by the industry is intended to replace the present Section 5(b)(2). The present subsection prohibits the carrying of a security through the mails or in interstate commerce for the purpose of sale or for delivery after sale unless accompanied or preceded by a Section 10 prospectus. Its requirements can thus be satisfied by the delivery of a prospectus with the security at the time when collection is made of the purchase price. The proposed new Section 5(a)(2) would, however, prohibit the collection of any part of the purchase price of any security unless the purchaser has been sent or given a current general prospectus so that it would normally be received by him, not more than thirty days before the sale and not later than the business day before the collection or receipt of payment for the security. The proposed Section 5(a)(2) is acceptable to and is recommended by the representatives of the industry. It provides investors with a new safeguard not present in the existing statute.

As to Section 5(a)(3)

Section 5(a)(3) as proposed by the representatives of the industry is intended to be applicable to sales made on the day when a new issue of securities is first offered to the public (after the coming into effect of the registration statement) and to all sales made within the next seven days after such an offering takes place. The representatives of the industry recognize that if offerings of securities are to be permitted prior to the effective date of a registration statement, it is desirable to provide certain new safeguards to ensure that all essential information contained in the registration statement and final prospectus shall be made available to the purchaser before he enters into a binding sales contract. The proposed Section 5(a)(3) establishes such a procedure. It requires that during the first seven days of public offering after the effective date of a registration statement, no sale of a security may be made unless—

(a) a general prospectus is sent or given to the purchaser so that it would normally be received by him on the day before the day on which the sale is made; or

(b) if a general prospectus is not given to a purchaser prior to the day when a sale is made, the purchaser must, not later than the next business day, be sent or given a prospectus and a written confirmation of the sale telling him that he has an absolute right of cancellation if, not later than noon on the first business day after the day when he receives the written confirmation, he advises the seller that he has examined the general prospectus and that he elects not to proceed with the purchase.

* * * * * * * * * * *

The proposed new Section 5(c) has been developed in the conferences with the Commission. Its purpose is to broaden the jurisdictional base on which the Commission may enforce the requirements of the proposed Section 5. Secifically the new subsection would make the prohibitions of the Section apply if the mails or any means or instrumentality of interstate commerce are used at any time, or in any way, in offering a security for sale, selling it, delivering it for the purpose of sale, or after sale, or collecting or receiving payment in whole or in part of the purchase price. Thus, if the procedural requirements of Section 5 in respect of any of these matters are not strictly observed by any dealer, the criminal provisions established by the Act would apply and injunctive and other relief would be available. Consistently with their conviction that the Act should provide every reasonable protection for investors the representatives of the industry accept and recommend the proposed Section 5(c) provided that Section 12(a), Section 5(a)

and Section 5(b) are amended in accordance with their proposals.

A-26

EXHIBIT VI

77th Congress
1st Session } HOUSE COMMITTEE PRINT

REPORT

OF THE

SECURITIES AND EXCHANGE COMMISSION

ON

PROPOSALS FOR AMENDMENTS TO THE SECURITIES ACT OF 1933 AND THE SECURITIES EXCHANGE ACT OF 1934

AUGUST 7, 1941

Printed for the use of the
Committee on Interstate and Foreign Commerce

UNITED STATES

GOVERNMENT PRINTING OFFICE

WASHINGTON : 1941

It shcuid also be noted that under the industry's proposal oral offers and solicitation could continue to be made after the effective date without being preceded or accompanied by any required information. At that time there would be no requirement for the use of even a "limited prospectus" to serve as a check upon sales talk by underwriters and dealers.

One further suggestion in connection with the proposal for amending section 5 has been developed in conferences with representatives of the securities industry. The registration and prospectus requirements of the statute do not presently apply to any act which is not effected through the mails or in interstate commerce even though other related acts in bringing about a sale or in collecting or receiving the purchase price of a security are effected by such means. The jurisdictional base is thus much narrower than it is in such laws as the mail fraud statute, which applies if the mails are used in any step of the transaction. As a part of the proposed amendment of

section 5, this loophole in the act would be closed by bringing within the requirements of that section all parts of the transaction if any part is effected through the mails or in interstate commerce.

Because of the importance of the registration and prospectus requirements the Commission has given painstaking consideration to all of the proposals and arguments presented by representatives of the securities industry. The Commission, however, cannot concur in any proposal such as that proposed by representatives of the securities industry which would strip the investing public of its present protections under the act without providing any compensating safeguards in the form of a real opportunity for the investor to examine what he is buying before he contracts to buy. It must oppose any proposal which would sacrifice the investing public in the interest of underwriters and dealers.

From the public's point of view there are four major defects in the industry's proposal to which we must

make particular reference in this report to the Congress:

(1) The proposal to permit solicitation before the effective date of the registration statement would necessarily subject investors to sales pressure before complete and accurate information in an effective registration statement would be available either to the Commission or to dealers or investors. Thus even before all the information required under the statute had been disclosed in the registration statement and before that information which had been disclosed could possibly have become general public knowledge—to say nothing of being examined by the Commission and analyzed and tested by independent experts—individual investors would be under the pressure of arguments by underwriters and dealers which would lead them to form conclusions based on sales effort rather than on factual analysis of the essential information which the Congress found should be included in the registration statement. Under the proposal it would also be possible for the

underwriters to form selling groups before the effective date of the registration statement—a procedure prohibited by the present statute. As a consequence dealers could be subjected to pressure to join the distributing organization prior to the time when the information which they should have in making that determination was available. This in turn would result in the dealers'. . .

EXHIBIT Vil

[COMMITTEE PRINT]

October 18, 1941

COMPARATIVE PRINT SHOWING PROPOSED CHANGES IN THE SECURITIES ACT OF 1933 AND THE SECURITIES EXCHANGE ACT OF 1934

Note.—The proposed changes included in this print have been developed in conferences between the Securities and Exchange Commission and representatives of the Investment Bankers Association of America, the National Association of Securities Dealers, Inc., the New York Curb Exchange, and the New York Stock Exchange (hereinafter referred to as "the securities industry").

All proposals of the Commission and of the securities industry are included in this print.

Where no explanatory note appears in connection with a proposed change, the Commission and the securities industry are in agreement as to its desirability.

Where there is disagreement between the Commission and the securities industry, or only conditional agreement, a note is inserted with the section as to which the difference exists indicating the disagreement and containing references to the respective positions of the Commission and the securities industry as set forth in their reports.

Where the Commission and the securities industry are in disagreement and have proposed different amendments to the same section, the amendments acceptable to the Commission are set forth followed by those proposed by the securities industry.

References to the Commission's printed report are to its report of August 7, 1941, printed for the use of the Committee on Interstate and Foreign Commerce of the House.

References to the securities industry's report are to its printed report of July 30, 1941.

The proposed changes would also involve some incidental amendments to sections 77 (f), 264. a, 393. a, and 518. a of the Bankruptcy Act. These proposals

appear in this print at pages 67-70 following the Securities Act of 1933, to which they relate.

Existing law in which no change is proposed appears in the type in which this paragraph is printed.

~~Existing law proposed to be omitted appears in the type in which this paragraph is printed~~.

Proposals acceptable to the Commission, whether conditionally or unconditionally, appear in the type in which this paragraph is printed.

Proposals of the securities industry with which the Commission disagrees appear in the type in which the paragraph is printed.

J. 62382——1

Securities Act. § 5 (Cont'd)

~~(2) to carry or to cause to be carried through the mails or in interstate commerce any such security for the purpose of sale or for delivery after sale, unless accompanied or preceded by a prospectus that meets the requirements of section 10.~~

Note.—The following amendment to section 5 is acceptable to the Commission but is opposed by the securities industry. The Commission's position is discussed at pages 3-12 of its printed report. The position of the securities industry is discussed at pages 87-95 of its report.

[Amendments Acceptable to Commission]

(a) It shall be unlawful for any person, by use of the mails or in interstate commerce or otherwise, to sell any security, to deliver any security for the purpose of sale or after sale, or to collect or to receive payment of any part of the purchase price of any security—

(1) unless a registration statement is in effect as to such security; and

(2) unless a general prospectus current at the time of the sale has been sent or given to the purchaser so that it would normally be received by him not more than thirty days and not less than twenty-four hours before the sale, or, in the case of a sale made by acceptance by the seller of an order or offer to buy, not more than thirty days and

not less than twenty-four hours before the making of such order or offer.

(b) It shall be unlawful for any person, by use of the mails or in interstate commerce or otherwise, to offer to sell any security to any person—

EXHIBIT VIII

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA, :

- V - : INDICTMENT

LOUIS E. WOLFSON and 66 Cr.

ELKIN B. GERBERT, :

Defendants. :

----------X

The Grand Jury charges:

From on or about the first day of January, 1959, and continuously thereafter, up to and including the date of the filing of this indictment, in the Southern District of New York, and elsewhere, LOUIS E. WOLFSON and ELKIN B. GERBERT, the defendants herein, and Cecil Wolfson, Saul Wolfson, Sam Wolfson, Isidore Sherman and Arvin Rothschild, named herein as co-conspirators but not as defendants, unlawfully, wilfully and knowingly did combine, conspire, confederate and agree together

and with each other, and with other persons to the Grand Jury unknown, to commit certain offenses against the United States, to wit, violations of Sections 77e(a) and 77x of Title 15, United States Code.

2. It was a part of said conspiracy that said defendants and co-conspirators unlawfully, wilfully and knowingly would, directly and indirectly, make use of means and instruments of transportation and communication in interstate commerce and of the mails to sell a security, to wit, common stock of Continental Enterprises, Inc., (hereinafter referred to as "Continental"), through the use and medium of a prospectus and otherwise, no registration statement as to said security being in effect with the Securities and Exchange Commission.

3. It was further a part of said conspiracy that said defendants and co-conspirators unlawfully, wilfully and knowingly would, directly and indirectly, carry and cause to be carried through the mails and the means and instrumentalities of transportation and communication in interstate commerce a security, to

wit, common stock of Continental for the purpose of sale and for delivery after sale, no registration statement as to said security being in effect with the Securities and Exchange Commission as required by law.

4. Among the means by which the defendants and co-conspirators would carry out the said conspiracy were the following:

(a) The defendants would control Continental.

(b) The defendant LOUIS E. WOLFSON, co-conspirators Cecil Wolfson, Saul Wolfson, Sam Wolfson, and Isidore Sherman, and Nathan Wolfson would obtain an aggregate interest of approximately 85% in a patent for an aerosol dispensing device known as Propel-Pak.

(c) The defendant LOUIS E. WOLFSON and his co-conspirators would cause a contract to be executed between the owners of the Propel-Pak patent and Continental granting licensing rights to Continental and providing for the payment to the

patent owners of approximately 35 to 40 percent of the royalties resulting from sub-licensing agreements.

(d) Simultaneously, with and subsequent to the dissemination of publicity regarding the development and marketing of the Propel-Pak aerosol device the defendants and their co-conspirators would, through numerous brokers, sell to the public approximately 460,000 shares and 230,000 shares respectively of common stock of Continental, no registration statement being in effect as to such securities as required by law.

OVERT ACTS

In furtherance of said conspiracy and to effect the objects thereof, the defendants hereinafter named in counts 2 through 19, as overt acts in the Southern District of New York, among others, caused the mailings hereinafter alleged in counts 2 through 19, each of which is alleged herein as a separate overt act pursuant to the conspiracy.

(Title 18, United States Code, Section 371)

COUNTS TWO THROUGH NINETEEN

The Grand Jury further charges:

On or about the dates hereinafter specified in counts 2 through 19, in the Southern District of New York, the defendants LOUIS E. WOLFSON and ELKIN B. GERBERT unlawfully, wilfully and knowingly, directly and indirectly, made use of the mails to sell securities, to wit, common stock of Continental Enterprises, Inc., through the use and medium of a prospectus and otherwise, no registration statement as to such securities being in effect with the Securities and Exchange Commission, in that the said defendants caused to be sent, carried and delivered by mail confirmations of sales of shares of common stock of Continental Enterprises, Inc. in the amounts hereinafter set forth:

COUNT	DATE	NUMBER OF SHARES
2	October 5, 1961	900
3	October 6, 1961	1,000
4	November 14, 1961	5,000
5	November 22, 1961	1,000

6	November 24, 1961	5,000
7	December 27, 1961	1,000
8	December 28, 1961	300
9	December 29, 1961	100
10	January 8, 1962	2,200
11	January 9, 1962	1,300
12	October 5, 1961	2,000
13	November 10, 1061	6,000
14	November 13, 1961	1,000
15	November 15, 1961	1,000
16	November 22, 1961	1,250
17	October 5, 1961	1,000
18	October 6, 1961	8,000
19	October 9, 1961	1,500

(Title 15, United States Code, Sections 77e(a)(1) and 77x; Title 18, United States Code, Section 2)

Foreman

ROBERT W. MORGENTHAU
United States Attorney

EXHIBIT IX

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- -

UNITED STATES OF AMERICA

vs.

LOUIS WOLFSON, et al

- -

Before Hon. Edmund L. Palmieri, District Judge, and a Jury

66 CR 720

STENOGRAPHER'S MINUTES

. . . took some steps in furthering the conspiracy.

Then the second part of the indictment comes along and that is Counts 2 through 19, the entire remainder of the indictment and in that section of the indictment substantive counts are charged, substantive violations of the Securities Act.

Specifically, 19 separate uses of the mails whereby a confirmation was sent in connection with a

specific trade in Continental Enterprises stock ranging from 8000 share down to 100 shares.

Each specific use of the mails as set forth in this indictment is alleged as a separate crime but doesn't involve really any additional proof, because in proving the conspiracy count the Government will bring out all the facts as to the sales that led to these particular charges.

There will be some technical proof and I want to flag this for you because there will be some brokerage records that may come in, blotters and other things, that will just be put in, won't be read. They will be put in evidence and you will be free, of course, to examine them if you want to at the conclusion of the case. But this forms the basis for the proof that these mailings took place.

Most of the proof that the Government will bring out through the witnesses who will take the stand involves the sell-out of the stock itself. How was the sell-out of the stock accomplished?

The Government will show that primarily it was through Elkin Gerbert during the period 1960, 1961 and 1962 when the price of Continental Enterprises stock was going from a price of 2 in late 1960 up to a price of about 8 in the spring of 1961, and then back down again to a price of 2 in early 1962.

At that time when the price was up, the defendants Louis Wolfson and Elkin Gerbert and the associates of Louis Wolfson sold out the stock that is alleged in the indictment.

They did so through Gerbert, through eight different brokers. If you count some of the sales through the Wolfson family, it is ten different brokers. And Gerbert, essentially Gerbert would go around to those brokers and place the sales.

The profit as you will see for the . . .

* * *

. . . came into a situation where somebody insisted upon asking a question, they could go to another broker to get rid of more of their stock.

The Government will prove that these men in selling out the $2 million worth of stock that the two of them sold out and the $3 million that the entire family group sold out, that they knew the law, they knew what they were doing was illegal and knew that the public would very well like to know that when the price was up at 8, the defendants were selling it out to the public without telling anybody about it.

The Government will show you that the way this was done was in a way that the defendants were very careful not to run afoul of any laws against fraud.

Another thing I want to flag for you, you will see a document put in dated May 6, 1960 which will go into evidence, where the defendant Wolfson himself was writing around to the inside group and saying, "Now, heavens, fellows, let's not commit any fraud."

The Government will show that indeed the defendants were very careful not to commit the kind of fraud that would be illegal in any state for anybody because they didn't have to. In this business which was recognized when the Securities Act was passed,

you don't have to commit fraud and that is why the registration provisions are there.

If you focus on the charge, focus yourselves on the charge, they did not file a registration statement and sold the stock anyway, anyway, the issue of fraud just leaves the case.

Also, similarly, the last thing the defendants wanted was to get involved with the Internal Revenue people. You will see the defendants reported the profits on their tax returns, of course, being careful to report them in such a way that no violation of the Securities Act would appear or could be discerned by looking at the income tax returns along with all the other stock transactions that they entered into during these years.

That is the Government's case and that is what the proof will be. The Government does not accuse these particular captains of finance of the kind of vulgar fraud that other people less sophisticated have entered into if they wanted . . .

* * *

. . . you have a copy of it with you?

MR. GOULD: We will provide a copy.

MR. ARMSTRONG: I submit that case does not affect the basic prohibitions of the law discussed by your Honor in the opinion, and it certainly does not affect the liability of a controlling person who has been shown to sell out a large quantity of stock, that has been shown to be sold out by these two defendants working in concert with each other through a variety of brokers.

THE COURT: It is clear to me that what they allegedly did and what the proof indicates they did is contrary to the purpose and spirit of the law. Certainly, if this law was intended to protect the investing public against ill-advised investments, the registration procedure was intended to give them that modicum of information or safety that the law could provide, and anybody in the position in which these two defendants were at the time of these transactions clearly, if we were to decide the case on the basis of its spirit and the purposes, should have filed a registration

statement and should have made the Commission and through the Commission the public aware of a control situation, and they did not do it.

But their attorneys say, and I think not without a great deal of persuasiveness, two things that are troublesome. No. 1, they say this in effect is a test case, and one can't help asking one's self as a lawyer if this law has been on the books for so long why hasn't this very important and troublesome question been finally and authoritatively adjudicated long before this?

Isn't the fact that there has been this long silence itself an indication that the law was lacking either in its explicit provisions or lacking in its terms so as to make it readily enforceable?

That is one question that must be answered, it seems to me. . . .

* * *

. . . believe the various brokers who testified and whether you believe the documents that went into evidence, or whether you believe the defendants, who

present themselves as the kind of vague, not remembering, above-it-all and just sitting in some office off in a corner somewhere collecting the money and the proceeds from all these ventures but having no responsibility whatsoever for what was going on.

Something was said by Mr. Brenner and Mr. Gould, and that is that no fraud is alleged in this case.

I said that in my opening and I repeat it to you now.

But what do I mean by that? That this is not a criminal case, that the government doesn't think these people did anything that was really not wrong?

Fraud is a technical term in the law and to defraud somebody is a legal matter and it means to make a positive misrepresentation, make a fraudulent statement, that the person to whom you make the fraudulent statement acts upon it to his detriment and which can be checked up on fairly . . .

* * *

. . . themselves.

Underlying all this is an attitude that I don't want to give you the wrong type of impression -- I don't want to paint this as a type of conspiracy where a bunch of men in cloaks meet in a graveyard at night and work out some evil scheme.

No, that isn't what they did. They didn't sit down and say: Now how can we go about violating the security laws today?

Louis Wolfson needed money and he decided he was going to sell his stock, and he decided that in selling his stock the easiest thing to do was get rid of Continental Enterprises stock and the public be damned.

And the conspiracy consists not of a secret arrangement -- this is not a conspiracy of secrecy. It is a conspiracy of arrogance and audacity.

These people felt that they were above the law and that if anyone ever came and asked them about it they could just say: I didn't know, I didn't know.

I am very happy you are telling me about it and I certainly won't ever do it again. . . .

* * *

. . . why, that this is why Louis Wolfson didn't bother to file a registration statement.

As I have said, the only problem with this course of action is that it is against the law. As I have said, you are entitled to conclude that the way he intended to handle that problem if it ever arose, was with an act of wounded innocence similar to the act that I submit to you he put on in 1950 and that I submit to you you are entitled to conclude he put on in that chair. He had already done that in 1955, don't forget. At A. M. Kidder he tried a distribution and it had worked because A. M. Kidder was told in 1955 he wasn't in control of the company. Maybe it will work again, sell it, Buddy.

So I submit that with arrogance and with disdain for the law, with disdain for what Louis Wolfson now calls details, he went out and sold it, confident that

he was insulated from the law by people around him and by his own protestations of ignorance.

I am not going to dwell on the other things that a registration statement would have revealed. You can look at the publicity material . . .

* * *

. . . I would like to turn for a moment to 9-A, Defendant's Exhibit B.

This is the wonderful letter from Louis Wolfson to his friends, again his philosophy, take care of your friends and relatives.

According to Mr. Gould -- according to Mr. Wolfson, he was concerned with the enthusiasm, he didn't want anybody to lose money. He had a real concern for people who might get hurt.

Well, I am not content that doing something in satisfaction of a law or in order to avoid violating it constitutes a crime, as counsel implied that I contended.

I am simply saying that if you think 9-A is a document that shows a genuine, honest concern of

this man for the stockholders in his company, you are entitled to a little skepticism based upon his experience just before this event where he was enjoined for fraudulent practices, where he consented to an injunction involving fraudulent practices.

You can understand that if this man can pick up three million dollars by selling unregistered stock, he doesn't want to jeopardize this kind of operation by indulging in the kind of vulgar fraud that lesser individuals might have to resort to in order to make money at the expense of the public.

I really can't move on from this topic without addressing my attention also to this marvelous reply from Arvin K. Rothschild dated May 7, 1960.

Remember your memo of May 6, 1960 -- one day, it took him, one day, this pillar of independence, to come back with this magnificent answer saying I would rather have friends upset now than possibly hurt financially at a later date. Lord forbid! exclamation point.

I contend that you can view those documents in the light of the kind of self-serving pious testimony that you have heard from both of these men and that you are entitled to a little skepticism as to the pristine purity of their motives in placing things, like that in the files.

Even if it is genuine, even if he was concerned, what was he concerned about? About this list of people -- that is what he is concerned about, his friends and his relatives.

Along a similar line, the tax returns.

The government put in Mr. Wolfson's tax returns. Again, I don't want to tilt at windmills. I am not proving the case that the defense says I am proving.

I don't contend this was a furtive conspiracy. In contend that it was an arrogant conspiracy and I contend that just as Mr. Wolfson wanted to avoid the fraud laws of the United States, so that the last people in the world he wanted to get involved with were the income tax people.

And Mr. Gould says the way you hide the conspiracy is to put it into your income tax so that the government can't see it.

Well, there isn't one shred of evidence in the case to indicate that there is any procedure at all whereby the fellow who gets the income tax return and goes through this voluminous schedule D with all kinds of stock transactions checks them to make sure that whether in each case there was a registration statement filed. . . .

* * *

. . . Armstrong made it abundantly clear that the vice of the defendant was in selling the stock, large quantities to the public without letting them in on the one crucial fact that he thought would have spoiled the game for him, namely, that the Wolfsons were selling out.

MR. GOULD: That is not fraud.

THE COURT: It may not be fraud but it was a dirty trick, and that is what he thought it was.

MR. GOULD: That is different than calling it a fraud.

THE COURT: He used Arvin Rothschild and Chandler's testimony and tied it all in in order to show to this jury that by making certain inferences from the evidence they could come to a conclusion that it was reprehensible on his part and it wasn't consistent with honest conduct and it was wrong.

MR. GOULD: He used the word "fraud."

THE COURT: No, he didn't. He expressly referred to fraud and said that there was no suggestion, as far as fraud in the case -- no attempt to cheat anybody by a dishonest device. There was no depriving of anybody of property through . . .

* * *

. . . must acquit the defendant on such count or counts regardless of what other facts you may find have been proven.

I will take up each one of those elements in order.

The first element, the use of the mail. The first element of the offense is what we call the jurisdictional element.

Congress has provided in the Securities Act that the sale of unregistered stock is a federal offense if the defendant in any way directly or indirectly used the mail or caused someone else to do so in connection with such sale.

In this case, for example, the government contends the defendants sold or caused to be sold or aided or abetted the sale of unregistered stock and that in connection with these sales they had dealings which, in the normal course of business, resulted in the use of the mails.

Each of the substantive counts in the indictment charges the defendants with causing the mailing of confirmations for the specific number of shares of Continental Enterprises stock. Any mailing made for the purpose of affecting the sale is sufficient. It is not required that the item sent through the mail be the stock certificates representing the shares sold. The item sent can be the confirmation of sale and it is sufficient if the matter that is mailed is mailed to the defendant himself or his agent. It is not necessary for

the defendant himself to do the mailing. The entire transaction may be between third parties.

It is for you to decide upon the evidence and reasonable inferences which that evidence will support whether the government has proved beyond a reasonable doubt that each of these defendants by his personal act or acts directly or indirectly caused the use of the mails charged in this court.

The government contends with respect to each of the substantive counts that on or about the date indicated in each count confirmation of the sale of stock was mailed to the defendants or their agents by the brokerage firm handling their sales. The government contends that the defendants ordered the various brokers to sell the stock and thus would have reasonably foreseen that the brokers would in the normal course of business mail confirmations to them or their agents.

The mailings about which I am speaking form the basis for counts 2 through 19 of the indictment which I read. Each of these counts charges a specific

illegal use of the mails in violation of the registration provisions of the Securities Act of 1933. Each such mailing, if proved, constitutes a separate offense.

With respect to the second of the elements, that is the failure to register the stock, the government has introduced a certified statement from the Securities and Exchange Commission that no registration statement was ever filed with the Commission with respect to the common stock of Continental Enterprises. That hasn't been contradicted and there appears to be no serious controversy about the fact that the Continental Enterprises stock referred to in the evidence was not registered.

Indeed, I believe that defense counsel in their summations made the assumption, at least implicitly, that no registration statement had been . . .

* * *

. . . 27th.

MR. ARMSTRONG: We are going to get into a problem here because that is a disputed date.

THE COURT: Let me say 1961.

MR. BRENNER: As far as this instruction goes, I don't care about the opening date. It is the last date which is important, which is March 27, 1961. I am raising no issue on the opening date.

THE COURT: Very well. Anything else, Mr. Brenner?

MR. BRENNER: Nothing else, your Honor.

THE COURT: If the jury is still here and haven't been taken out yet, you might well bring them in because I can give them this right away.

MR. ARMSTRONG: The government has one thing, and asks that you state in the indictment, both in the conspiracy count and in the substantive count, the word "prospectus" is used. It occurred to me at this time as your Honor was reading it that the jury could confuse the meaning of prospectus in the indictment with prospectus as your Honor outlined it. I ask that although the indictment says that the sales were accomplished by means of a prospectus and otherwise, that the government does not contend and

offered no proof that a prospectus was used in the sense that your Honor has described prospectus to the jury.

Of course, it is a legal matter and can be considered to be a confirmation or something of the sort. That is why it is in there. It is a matter of technical language.

MR. GOULD: The proper way would have been for the government to submit any request to charge, and if I am going to be foreclosed from making such request because I didn't get them to your Honor until ten or fifteen minutes before your Honor started to charge this morning, and those are ones specifically based on what happened last night, I can't imagine that the government at this stage can come in with something that is elemental to the case and which they have known right from the beginning.

THE COURT: Yes, I think you are right. I would like to suggest to Mr. Armstrong that the distinguished pleaders in this case have a very confused method, and I know they like to adhere to the

statutory language when the indictment is prepared, but in reading it to the jury I myself was disturbed that this language was used.

MR. ARMSTRONG: It was a prospectus in the sense of a legal term. It is defined to include, for instance, a confirmation. I don't think that it serves any useful purpose to the jury to take an indictment into the jury room, look at it, and conclude that the government means by that that a prospectus actually was used. I think that it can cause a great deal of confusion and I don't see any harm in saying the prospectus referred to is not a prospectus that your Honor described in your charge.

THE COURT: I prefer to wait for them to ask me a question about it. I think it is something that any lawyer would be sensitive to. I am hoping in the light of my explanation they won't be sensitive but since I have told them to let me amplify my charge if they get into trouble, I am hoping they will ask questions, and I will answer them. I would rather not get into it.

EXHIBIT X

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA :

- against - : 66 Cr. 720

LOUIS E. WOLFSON and
ELKIN B. GERBERT, :

Defendants. :

----------X

DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS COUNTS TWO THROUGH NINETEEN

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. . . firmations of sales in order to sell.

There is some authority indicating that the mailing of confirmations to the purchaser may violate section 5, though no cases squarely so hold. See, United States v. Hughes, 195 F.Supp. 795 (S.D.N.Y., 1961); United States v. Greenberg, 30 F.R.D. 164 (S.D.N.Y., 1962)* ; United States v. Kane, 243 F.Supp. 746 (S.D.N.Y., 1965).

Whatever may be the merits of that theory, it need not be dealt with here. It is here alleged that confirmations of sales of stock were mailed to the seller himself by the seller's own brokers.

That there is a clear distinction between confirmations sent to the purchaser and confirmations sent to the seller is demonstrated by Rules 15(c)(1)-1 and 15 (c)(1)-4 under the Securities Exchange Act of 1934. Rule 15(c)(1)-4 requires that confirmations be sent "before the completion of each such transaction."

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* The opinion in Greenberg does not make clear the fact that confirmations to the purchaser were involved. Such confirmations were the subject of the decision, however. See affidavit of Alenstein, sworn to 1967.

Rule 15(c)(1)-1(b) defines the term "completion of the transaction" as

"(1) In the case of a customer who purchases a security through or from a broker or dealer, except as provided in paragraph (2), the time when such customer pays the broker or dealer any part of the purchase price, or, if payment is effected by a bookkeeping entry, the time when such bookkeeping entry is made by the broker or dealer for any part of the purchase price;

"(2) In the case of a customer who purchases a security through or from a broker or dealer and who make payment therefor prior to the time when payment is requested or notification is given that payment is due, the time when such broker or dealer delivers the security to or into the account of such customer;

"(3) In the case of a customer who sells a security through or to a broker or dealer, except as provided in paragraph (4), if the security is not in the custody of the broker or dealer at the time of

sale, the time when the security is delivered to the broker or dealer, and if the security is in the custody of the broker or dealer at the time of sale, the time when the broker or dealer transfers the security from the account of such customer;

"(4) In the case of a customer who sells a security through or to a broker or dealer and who delivers such security to such broker or dealer prior to the time when delivery is requested or notification is given that delivery is due, the time when such broker or dealer makes payment to or into the account of such customer."

The Rule itself thus contemplates that in the case of confirmations sent to the seller, the "time of sale" occurs before the "completion of the transaction" and therefore before the confirmation need be sent.

There is more than a mere technical distinction between confirmations sent to the seller and those sent to the purchaser. It is at least arguable that the latter is more important than the former, since the purchaser may not even know the dollar amount of his

obligation until he receives a confirmation. This is so where, for example, he has ordered a purchase "at the market." The seller, on the other hand knows his obligation; he is to part with his stock.

More important, however, is the fact that a confirmation to the purchaser or his broker is a communication from the seller's side of the transaction to the buyer's side, while confirmation sent to the seller by his own broker is not. The confirmation sent to the purchaser, therefore, might be a mailing offensive to the policy of the Securities Act of 1933. A confirmation sent to the seller by his own broker, however, does not conflict with the thrust of the Act in the slightest.

As Professor Loss has said, speaking of the Securities Act of 1933 (1 Loss, supra, p. 184),

> ". . . the philosophy embodied in the statute is one of disclosure."

But "disclosure" has no meaning for purposes of the 1933 Act except in the context of communications between seller and buyer. A rule to the effect that absent registration such communications, if mailed,

violate section 5 would perhaps accord with the purpose of the statute.

A rule barring mailed communications between the seller and his own broker, however, would seem wholly alien to the policy of the Act. No disclosure is there involved.

The distinction we urge finds some support in United States v. Hughes, supra, 195 F.Supp. 795. There it was held that a confirmation sent to the purchaser was within the term "prospectus or otherwise" that is found in section 5. A "prospectus," we submit, could not possibly be a communication to the seller by his own broker; it can only be between the seller's side of the transaction and the buyer's side, since its primary function is to "offer" securities for sale. See section 2(10) of the Securities Act of 1933, 15 U.S.C. §77b (10).

By outlawing those mailings which are "to sell" an unregistered security "through the use or medium of any prospectus or otherwise," section 5 itself reinforces

the conclusion that a mailing between persons entirely on the seller's side cannot be "to sell,"

CONCLUSION

Here Congress did not, as it did in section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, ban certain mailings "in connection with the purchase or sale" of a security. Nor did it even ban certain mailings "in the offer or sale" of securities, as it did in section 17 of the Securities Act of 1933. Section 5(a)(1) instead outlaws only mailings "to sell" unregistered securities.

The language is plain. The courts should not "'extend such curbs beyond the specific limitations the Congress has imposed'" United States v. Robertson, supra, 181 F.Supp. 158, 165.

Counts Two through Nineteen of the indictment should therefore be dismissed for failure to charge an offense.

Respectfully submitted,

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EXHIBIT XI

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

UNITED STATES OF AMERICA :

- v - : 66 Cr. 720

LOUIS WOLFSON and :
ELKIN GERBERT,

:

Defendants.
----------X

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTIONS FOR DISMISSAL OF THE INDICTMENT, DISMISSAL OF THE SUBSTANTIVE COUNTS AND A TRANSFER OF THE TRIAL TO FLORIDA.

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Southern District of New York
Attorney for the United States
of America

MICHAEL F. ARMSTRONG
PAUL B. GALVANI
Assistant United States Attorneys
Of Counsel.

III. DEFENDANTS' MOTION TO DISMISS COUNTS 2 THROUGH 19

Defendants allege that the substantive counts in the indictment, counts 2 through 19, are defective because they allege mailings of confirmations to the defendant or his agent. Once again, defendants offer no explanation why this motion could not have been made earlier. On October 26, 1966 they were sent schedules listing the addresses referred to in the substantive counts (Gov. Aff. Ex. 1).

Counts 2 through 11 and 17 through 19 each alleges the mailing of a confirmation of sale from the New York broker effecting the sale to the defendant Wolfson. Counts 12 through 16 allege the mailings of similar confirmations to James Mullaney of Jacksonville, Florida. Mailings of this type are properly alleged in the indictment and, in any event, their relationship to proof of illegal activity must await evidence at trial.

15 U.S.C. 77e(a)(1) prohibits "use . . . of the mails to sell [unregistered stock] through the use or

medium of any prospectus or otherwise." Anyone who causes such a "use" is responsible for it under 18 U.S.C. §2.

In United States v. Greenberg, 30 F.R.D. 164, 166-67 (S.D.N.Y. 1962), Judge Bryan held that an indictment alleging the mailing of confirmations sufficiently alleged a crime, and that a final decision on the interpretation of such evidence should await the trial. In United States v. Kane, 243 F.Supp. 746, 750 (S.D.N.Y. 1956) and United States v. Hughes, 195 F.Supp. 795, 798-99 (S.D.N.Y. 1961), the mailing of confirmations was held to be appropriately alleged in substantive counts under 15 U.S.C. 77e(a)(1).

Defendants offer no case in support of their legal position. Schillner v. H. Vaughan Clarke & Co., 134 F.2d 875, 878 (2d Cir. 1943) (Def. Mem. p. 6) and United States v. Robertson, 181 F.Supp. 158 (S.D.N.Y. 1959) (Def. Mem. pp. 6-8), deal with the delivery of securities and the mailing of payment checks, respectively.

Defendants allege that the confirmations in question were sent to the defendant or his representative and, therefore, cannot be considered as mailings under the statute. They cite no cases in support of their theory, and rely only upon a citation of Rules 15(c)(1) through (4) under the Securities Exchange Act of 1934 (Def. Mem. pp. 10-11). These rules actually support the Government's position since they require a broker to send a confirmation to the seller at the time of the sale thus making the sending of such a confirmation a legally "essential" step in the process of sale.

The mailing by a broker of a confirmation to an out of state seller is as much a part of the mechanics of the sale as the mailing of the correspondent confirmation to the purchaser. Both mailings are caused by the seller's placing his order with the broker. The confirmations sent to both purchaser and seller constitute formal notifications of the trade. The confirmations signal the need for payment on the one side and surrender of the stock on the other. Contrary

to defendants' contention (Def. Mem. pp. 11-12), the question of whether the mailing is made from the "buyers side" to the "sellers side" has nothing to do with the "thrust" of Section 5 of the Securities Act since the mailings are not alleged to be fraudulent communications from seller to buyer but are merely part of the routine procedure of the sale.

EXHIBIT XII

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

UNITED STATES OF AMERICA :

- v - : 66 Cr. 720

LOUIS WOLFSON, :

Defendant. :
----------X

MEMORANDUM OF LAW OF THE UNITED STATES OF AMERICA IN OPPOSITION TO PETITION FOR WRIT OF CORAM NOBIS

RUDOLPH W. GIULIANI
United States Attorney for the
Southern District of New York
Attorney for the United States
of America

MARTIN KLOTZ
Assistant United States Attorney

- Of Counsel -

> (1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise, . . .

Section 1(10) of the Securities Act, 15 U.S.C. §77b(10) (emphasis added), provides in relevant part:

> The term "prospectus" means any prospectus, notice, circular, advertisement, letter of communication, written or by radio or television, which offers any security for sale or confirms the sale of any security; . . .

Since a prospectus includes a confirmation, since a confirmation necessarily comes after the sale, and since the statute proscribes the use of a prospectus "to sell" an unregistered security, the transmittal of a post-sale confirmation must be a use of the confirmation "to sell" the security. Wolfson's undisputed conduct thus violated the express terms of the statute: the

transmittal through the mails of confirmations of sales of unregistered securities was a use of a statutorily defined prospectus "to sell" the unregistered securities.

Not one of the cases cited by Wolfson in the present petition is to the contrary. For the most part, these cases address the question of whether use of the mails in negotiating payment for an unregistered security is within the reach of Section 5(a)(1). E.g., United States v. Robertson, 181 F.Supp. 158 (S.D.N.Y. 1959), aff'd in part and rev'd in part, 298 F.2d 739 (2d Cir. 1962); Darwin v. Jess Hickey Oil Corp., 153 F.Supp. 667 (N.D. Texas 1957); Repass v. Rees, 174 F.Supp. 898 (D. Colo. 1959). These uses of the mails, however, do not constitute uses of a "prospectus" within the meaning of the statute. United States v. Crosby, 294 F.2d 928 (2d Cir. 1961), cert. denied, sub nom. Mittelman v. United States, 368 U.S. 984 (1962), involved post-sale mailings of brochures. While these arguably would be prospectuses if used to offer for sale or confirm the sale of a security, they did neither in that case, since they were not shown to be used until

after the sale. And Schillner v. H. Vaughan Clark & Co., 134 F.2d 875 (2d Cir. 1943), which construed a different section of the Securities Act and addresses Section 5(a)(1) only in dictum in any event, involved post-sale mailings of the security itself; this case, too, does not address whether the post-sale mailing of a statutory prospectus confirming the sale of a security is a use of the prospectus "to sell" the security.

Wolfson's argument about a proposed amendment to the Securities Act in 1941 is equally unavailing. In 1941, the Securities and Exchange Commission recommended that Section 5(a)(1) be rewritten to proscribe expressly use of the mails, inter alia, "to collect or receive payment of any part of the purchase price of any security." Report of the Securities and Exchange Commission on Proposals for Amendments to the Securities Act of 1933 and the Securities Exchange Act of 1934, House Comm. Print, Comm. on Int. & For. Commerce, 77th Cong., 1st Sess. (1941) 7, 26-27. Wolfson apparently infers from Congress's . . .

EXHIBIT XIII

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

UNITED STATES OF AMERICA

v. 66 Cr. 720

LOUIS WOLFSON,

Defendant.
----------X

February 23, 1988
11:00 a.m.

Before:

HON. KEVIN THOMAS DUFFY,

District Judge

APPEARANCES:

RUDOLPH W. GIULIANI
United States Attorney for the
Southern District of New York,

MARTIN KLOTZ
Assistant United States Attorney

RICHARD DERZAW
LOUIS LOSS
-and-
WILLIAM MATTIS
Attorneys for Defendant

That's not true.

MR. LOSS: Well, not in the sense --

THE COURT: But the use of the term "prospectus" has nothing to do with anything being sent to the seller, that I'll buy.

MR. LOSS: On the standing point, my reply brief, pages 4 and 5, I will rely on.

(Court adjourned)

EXHIBIT XIV

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X
UNITED STATES OF AMERICA,

-v-

LOUIS WOLFSON,

Defendant.

66 Cr. 0720 (KTD)

MEMORANDUM & ORDER

----------X

APPEARANCES:

HON. RUDOLPH W. GIULIANI
United States Attorney for the
Southern District of New York
Attorney for the United States
of America
One St. Andrew's Plaza
New York, NY 10007
Of Counsel: Martin Klotz, Esq.
Assistant U.S. Attorney

Professor Louis Loss
1525 Massachusetts Avenue
Cambridge, MA 02138

Hon. William H. Maness
801 Investors Building
118 West Adams Street
Jacksonville, Florida 32202
- and -
Richard L.. Derzaw, Esq.
1384 Broadway
New York, NY 10018
Attorneys for Defendant

KEVIN THOMAS DUFFY, D.J.:

Wolfson here files his third petition for a Writ of Coram Hobis from his conviction, over 20 years ago, of one count of conspiracy to violate Section 5(a)(1) of the Securities Act of 1933 and 18 counts of substantive violations of that statute. The petition has been filed despite the fact that Wolfson has long since served the concurrent sentences of one year of imprisonment imposed on each count and has paid both fines totaling $100,000 and the costs of prosecution. The parties to this petition have devoted substantial argument to the issue of whether a Writ of Coram Nobis is appropriate in this situation. I will not address that issue, however, because I find that the arguments in support of the petition are completely without merit.

The petition rests on Wolfson's claim that the indictment underlying his conviction was based on an interpretation of Section 5(a)(1) of the Securities Act of 1933, 15 U.S.C. §77e(a)(1) which was so novel and so much broader than any interpretation at that time that it

was unforeseeable and thus, as applied, constituted an ex post facto law prohibited by the Fifth Amendment to the Constitution. Section 5(a)(1) provides:

> (a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—
>
> (1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise.

The jurisdictional predicate for Section 5(a)(1) liability in Wolfson's indictment was use of the mails. Wolfson asserts that until his indictment, using the mails to simply send a confirmation of sale from the broker to the seller was a post-sale use of the mails and as such was not sufficient for Section 5(a)(1) liability. Yet, such a mailing was the only use of the mail

shown by the government as the only jurisdictional proof against Wolfson.

Wolfson's argument is insufficient to support the issuance of a Writ of Coram Nobis. The argument, if valid, would be relevant only to the convictions for the substantive violations of the statute. However, the sentences on the substantive counts and that on the conspiracy count were imposed concurrently; therefore vacating the sentence on the substantive counts would not vacate the conviction or any aspect of the sentence. It has long been recognized that one can be convicted of a conspiracy in the absence of proof of the elements of the underlying substantive claim. The asserted novelty of a section 5(a)(1) violation in the mailing of sale confirmation slips does not affect the fact that the jury found Wolfson guilty of agreeing to violate Section 5(a)(1) and, with his co-conspirator, of committing acts in furtherance thereof. The jury's finding is sufficient for the conviction of conspiracy to stand despite the arguments offered in support of this writ. Therefore, no fundamental error

would be corrected if Wolfson were to succeed with his argument and the question raised by this petition is moot.

Insofar as Wolfson's argument applies to his conviction on the substantive counts charged in the indictment, it is also insufficient to warrant the issuance of the Writ. Essentially, his argument suggest that no one could reasonably foresee that a post-sale mailing of a confirmation to the seller in a securities transaction would be sufficient to fulfil the "use of the mails" element of the crime prior to the Wolfson prosecution. Wolfson has already raised and lost this argument in his direct appeal from his conviction. The Court of Appeals for this Circuit had no difficulty determining that section 5(a)(1) was reasonably and foreseeably applied to such use of the mails. That court addressed this specific issue as follows.

> The appellants assert that the government's proof is legally insufficient as to all counts, but particularly as to the

substantive ones, for the reason that mere proof of the mailing of sales confirmation slips from the brokers to Wolfson or his agent was not a use of the mails "to sell" unregistered securities within the mean [of] §5(a)(1) of the Act. We do not agree.

Section 5(a)(1) quoted hereinabove categorically forbids the direct or indirect use of the mails "to sell" securities not registered as the law requires through the use or medium of any prospectus or otherwise. By this language "* * * Congress meant to exert its power to the full constitutional extent permitted by the commerce clause and the postal clause." But this court in that case in holding that delivery by mail of stock certificates to a buyer pursuant to an oral contract of sale was within the statutory definition of "sell" in §12 of the Act, 15 U.S.C. §771 by

dictum conceded, page 878, that the word "sell" may have a narrower meaning in section 5 than it has in section 12." It said: "It is true that the word 'sell' in the phrase 'to make use of * * the mails to sell' as used in subdivision (a)(1) of section 5 cannot be given a meaning broad enough to include delivery of the stock certificate after sale without making purposeless the phrase in subdivision (a)(2) 'for delivery after sale.'" Nevertheless the general rule is well established that "[W]here one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he 'causes' the mails to be used." And it has been held in the Fifth Circuit, McDaniel v. United States, 343 F.2d 785, 788 (C.A.5, 1965),

> that use of the mails to send a confirmation of a sale to a buyer of stock constituted a use of the mails within the meaning of §5 of the Act. It has also been so held on more than one occasion in the court below.

United States v. Wolfson, 405 F.2d 779, 783-84 (2d Cir. 1968) (quoting, respectively, Schillner v. H. Vaughan Clarke & Co., 134 F.2d 875, 878 (C.A.2, 1943) Pereira v. United States, 347 U.S. 1, 8, 9, 74 S.Ct. 358, 363, 98 L.Ed.435, (1954)) (citations omitted). The Court of Appeals also quoted with approval from United States v. Kane, 243 F.Supp. 746, 750 (S.D.N.Y. 1965):

> This subsection [§5a(1) of the Securities Act] is violated when, in connection with the sale of such stock, the mails are used to transmit an offer or other sales literature, to transport the securities after sale, to remit the proceeds to the seller, to send confirmation slips to the buyer, and

> perhaps even when used in more tangential ways.

Based on this reasoning the Court of Appeals concluded:

> We regard this as a correct statement of the law. If anything said in Schillner, supra, can be read to the contrary it is to be disregarded. We see no basis upon which to draw any distinction between confirmation of a sale of stock to a buyer and confirmation to a seller since both are essential to a valid sale.

United States v. Wolfson, 405 F.2d at 784 (emphasis added).

In sum, Wolfson's arguments regarding his conviction on the conspiracy count of his indictment would not vitiate the conviction and sentence and are therefore moot. Because Wolfson's arguments regarding his convictions on the substantive counts have been raised on direct appeal and decided adversely to him, they cannot be raised again here.

The petition for a Writ of Coram Nobis is denied.

SO ORDERED.

DATED: New York, New York

May 17, 1988

KEVIN THOMAS DUFFY, U.S.D.J.

EXHIBIT XV

88-1234

To be argued by
Martin Klotz

United States Court of Appeals

FOR THE SECOND CIRCUIT
Docket No. 88-1234

UNITED STATES OF AMERICA,

Appellee,

—v.—

LOUIS WOLFSON,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

RUDOLPH W. GIULIANI,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

MARTIN KLOTZ,
LINDA IMES
Assistant United States Attorneys, Of Counsel.

> . . . state commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise. . . .

The term "prospectus" is defined in section 2(10) of the Securities Act as follows:

> The term "prospectus" means any prospectus, notice, circular, advertisement, letter of communication, written or by radio or television, which offers any security for sale of *confirms the sale of any security*. . . .

Title 15, United States Code, Section 77b(10) (emphasis added). Because a prospectus includes a confirmation which necessarily follows the agreement to sell, and because the statute proscribes the use of a prospectus "to sell" an unregistered security, the transmittal of a post-sale confirmation must be a use of the confirmation "to sell" the security. Wolfson's undisputed conduct thus violated the express terms of the statute: the transmittal through the mails of confirmations of sales of unregistered securities was a

use of a statutorily-defined prospectus "to sell" the unregistered securities.

On direct appeal Wolfson advanced numerous arguments, all rejected by this Court, why his conviction should be overturned. *See generally United States* v. *Wolfson*, 405 F.2d 779 (hereinafter "*Wolfson*"). Two of these arguments are particularly relevant here. First, Wolfson contended that section 5 was unconstitutionally vague. This Court held that this argument was not available to Wolfson because his defense was not that he misunderstood or misinterpreted the statute, but rather that the requirements of the statute were beneath his notice. 405 F.2d at 783. Second, Wolfson argued that the mailing of confirmation slips to him or his agents was not a use of the mails "to sell" the unregistered stock. This Court rejected Wolfson's position, holding that a confirmation of a sale of stock, whether transmitted to a buyer or seller, is "essential to a valid sale." 405 F.2d at 784. In so holding, this Court relied upon three cases from the Southern District of New York and one

from the Fifth Circuit. The Supreme Court denied Wolfson's petition for a writ of *certiorari*. 394 U.S. 946 (1969). Wolfson now contends that this Court's holding was so unforeseeable and such a dramatic departure from established law that he could not have known his conduct was illegal at the time he engaged in it.

Faced with the clear language of the statute, which unambiguously criminalized his conduct, Wolfson contends that the only confirmation included within the statutory definition of a "prospectus" is a confirmation to a buyer. ((Br. 14-16). To advance this point, Wolfson ignores the statute itself and instead suggests that its "purpose was to ensure that a *buyer* receive a full prospectus; there is, of course, no logical reason to be concerned that a seller receive one." (Br. 14). But the plain language of the statute does not distinguish confirmations to buyers from confirmations to sellers: it includes any notice which "confirms the sale of any security" within the definition of "prospectus." Indeed, this Court has adopted the view that under the 1954

amendment to section 2(10), which defines "prospectus," "*any* confirmation is a prospectus." *Byrnes* v. *Faulkner, Dawkins & Sullivan,* 550 F.2d 1303, 1310 (2d Cir. 1977) (emphasis in original).

Nor can Wolfson's argument about a proposed amendment to the Securities Act in 1941 save him from the plain language of the statute. (*See* Br. 17-18). In 1941, the Securities and Exchange Commission recommended that section 5(a)(1) be rewritten to proscribe use of the mails, *inter alia*, "to collect or receive payment of any part of the purchase price of any security." Report of the Securities and Exchange Commission on Proposals for Amendments to the Securities Act of 1933 and the Securi- . . .

EXHIBIT XVI
UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 2nd day of November, one thousand nine hundred and eighty-eight.

PRESENT:

HONORABLE J. EDWARD LUMBARD,
HONORABLE GEORGE C. PRATT,
HONORABLE J. DANIEL MAHONEY,

Circuit Judges.

----------X

UNITED STATES OF AMERICA,

Appellee,

- against - Docket No. 88-1234

LOUIS E. WOLFSON and
ELKIN B. GERBERT,

Defendants,

LOUIS E. WOLFSON,

Defendant-Appellant.

----------X

This appeal from an order of the United States District Court for the Southern District of New York, Kevin Thomas Duffy, Judge, denying a petition for a writ of coram nobis was submitted on a transcript of the district court record.

ON CONSIDERATION WHEREOF, it is now ordered that the order appealed from is affirmed.

Petitioner Louis Wolfson was convicted in 1967 of selling and conspiring to sell unregistered securities through the use of a prospectus in violation of §5(a)(1) of the Securities Act of 1933. The jurisdictional element of a §5(a)(1) offense requires use of interstate commerce or "of the mails to sell" an unregistered security. In Wolfson's case, the only use of the mails was the sending of post-sale confirmations of sale from Wolfson's broker to Wolfson himself, the seller. On direct appeal, this court held that use of the mails to send a confirmation of sale to the seller satisfied the jurisdictional element of use "of the mails to sell". United States v. Wolfson, 405 F.2d 779, 783-84 (2d Cir. 1968), cert. denied, 394 U.S. 946 (1969).

In this appeal from the denial of his third petition for a writ of coram nobis, Wolfson argues that the decision affirming his conviction unforeseeably expanded the scope of §5(a)(1) and constituted, as applied to Wolfson, an ex post facto interpretation denying Wolfson fair notice that his conduct was illegal and thus violating his fifth amendment due process rights. This claim has no merit.

In Bouie v. City of Columbia, 378 U.S. 347 (1964), the Supreme Court held that in some narrow circumstances judicial expansion of a statute can have the same effect as an ex post facto law and can, thus, violate a defendant's due process rights. Not every judicial expansion of a statute, however, creates a due process violation. According to Bouie, only those enlargements which expand "narrow and precise statutory language[]" and which are also "unexpected and indefensible by reference to the law which had been expressed prior to the conduct at issue[]" deprive a person of due process because he had no fair notice that his conduct was criminal. Bouie v. City of

Columbia, 378 U.S. at 352-54 (1964), quoting Hall, General Principles of Criminal Law at 61 (2d ed. 1960). See also United States v. Martino, 648 F.2d 367, 381 (5th Cir. 1981), cert. denied, 456 U.S. 949 (1982).

For the following three reasons, Wolfson's conviction does not constitute an "unexpected and indefensible" judicial enlargement of a statute proscribed by Bouie. First, unlike the language at issue in Bouie, the language of §5(a)(1) is not "narrow and precise", but is broad and nonrestrictive. Section 5(a)(1) broadly prohibits "use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell [a] security through the use or medium of any prospectus or otherwise[]". 15 U.S.C. §77e(a)(1) (emphasis added). Section 2(10) which defines "prospectus" likewise broadly defines that term to include any notice that "confirms the sale of any security[]. 15 U.S.C. §77b(10) (emphasis added). This broad, nonspecific

language sufficiently alerted Wolfson not to rely on a narrow or technical construction of the statute.

Second, at least one case prior to Wolfson's actions, United States v. Hughes, 195 F.Supp. 795 (S.D.N.Y. 1961), held that §5(a)(1) applied to post-sale mailings of confirmations to buyers and, thus, presaged an expansive jurisdictional reach of §5(a)(1).

Finally, as early as 1961, securities scholars warned that §5(a)(1) might extend to post-sale mailings of confirmations to sellers. See 1 L. Loss, Securities Regulation at 209 (2d ed. 1961) ("Recent decisions indicate that the rationale of the mail fraud cases may be extended so as to hold that in such a case the seller is using the mails or interstate facilities 'to offer' and 'to sell' within the meaning of §§5(c) and 5(a)(1) on the theory that payment is an essential element of a sale and that the seller should reasonably have foreseen that payment might be made by one of the jurisdictional means. It is too early to say whether this approach will stand up, but the possibility cannot be disregarded." (emphasis added)).

Viewed together, these three factors negate Wolfson's contention that the interpretation of §5(a)(1) to include a post-sale mailing of a confirmation to a seller might constitute, as applied to him, an "unexpected and indefensible" expansion of the statute and a violation of the due process clause in the nature of an ex post facto violation.

Accordingly, we affirm the district court's order denying Wolfson's petition for a writ of coram nobis.

J. Edward Lumbard, U.S.C.J.

George C. Pratt, U.S.C.J.

J. Daniel Mahoney, U.S.C.J.

N.B. This Summary Order will not be published in the Federal Reporter and should not be cited or otherwise relied upon in unrelated cases before this or any other court.

EXHIBIT XVII

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 12 day of December, one thousand nine hundred and eighty-eight.

----------X

UNITED STATES OF AMERICA,

Appellee,

- v - Docket No. 88-1234

LOUIS E. WOLFSON and
ELKIN B. GERBERT,

Defendants,

LOUIS E. WOLFSON,

Defendant-Appellant.

----------X

A petition for rehearing containing a suggestion that the action be reheard in banc having

been filed herein by counsel for the Appellant LOUIS E. WOLFSON.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

Elaine B. Goldsmith,

Clerk

By:

Fred M. Cassidy,

Chief Deputy Clerk.

PROOF OF SERVICE

I, WILLIAM H. MANESS, Attorney for Louis E. Wolfson, Petitioner, herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 10th day of February, 1989, I served three copies of the foregoing Petition for Certiorari on the Solicitor General, Department of Justice, Washington, D.C. 20530 by mailing said copies by U.S. Mail.

ORIGINAL SIGNED BY:
WILLIAM H. MANESS

Attorney